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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

ROBERT A. MASON, individually and
on behalf of all others similarly situated
and the general public,

Plaintiff,

v.

HEEL, INC., a New Mexico
Corporation,

Defendant.

Case No. 3:12-cv-03056-GPC-KSC
Class Action

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR FINAL APPROVAL OF
CLASS ACTION SETTLEMENT**

**[FILED CONCURRENTLY WITH
DECLARATIONS OF RONALD A.
MARRON, GAJAN RETNASABA AND
PROPOSED ORDER; HEARING DATE
SET PER ORDER AT DKT. NO. 27]**

Judge: Hon. Gonzalo P. Curiel
Courtroom: 2D
Date: March 7, 2014
Time: 1:30 p.m.

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Pursuant to the Court's Order Granting Preliminary Approval, Dkt. No. 27, Plaintiff Robert A. Mason respectfully submits this Memorandum of Points and Authorities in support of his Motion for Final Approval of the proposed classwide Settlement with Defendant.

I. INTRODUCTION

This is a class action, certified for settlement purposes, in which Plaintiff asserted false and deceptive advertising of Defendant Heel, Inc.'s¹ homeopathic drugs. *See* Dkt. No. 1 at ¶¶ 32-34, 38, 40-42, 47, 49-52, 77-78, 99-100, 119-120; Dkt. No. 27 (Preliminary Approval Order, "PAO"). The action was settled in good faith after significant arm's length negotiations between the Parties, including through the use of an independent third party mediator, the Honorable Leo S. Papas (Ret.). As part of the settlement, Defendant has agreed to modify the labels of its homeopathic products in five significant aspects, to eliminate allegedly false and deceptive labeling and provide disclaimers that will advise consumers of the nature of Defendant's homeopathic drugs. On top of the strong injunctive relief provided by the settlement, Defendant has also established a substantial \$1 million common fund in favor of the Class, to provide claimants full cash refunds, with a generous cap, and several other benefits. As a result, the instant Class settlement is not only just fair, reasonable and adequate, but is strongly in the Class' and the public's best interest. Accordingly, Plaintiff respectfully requests the Court grant the Settlement Agreement final approval.

II. HISTORY OF THE LITIGATION

A. The Parties and the Pleadings

In his Complaint, Plaintiff alleged that Defendant's representations regarding the characteristics, benefits, and abilities of the Products at issue were false and misleading, violating the Unfair Competition Law ("UCL", Cal. Bus. & Prof. Code §§ 17200, *et seq.*), False Advertising Law ("FAL", *id.* §§ 17500, *et seq.*), Consumers

¹ As used herein, Heel refers only to the United States-based company located in New Mexico, and not its parent company located in Baden-Baden, Germany.

1 Legal Remedies Act (“CLRA”, Cal. Civ. Code §§ 1750, *et seq.*), and constituting a
 2 breach of express and implied warranties, violation of the Magnuson-Moss Warranty
 3 Act (“MMWA,” 15 U.S.C. §§ 2301, *et seq.*) and unjust enrichment. Compl. at ¶¶ 95-
 4 142.

5 On February 13, 2013, Defendant filed a motion to dismiss the complaint in its
 6 entirety. Dkt. No. 6. The parties fully briefed that motion, which involved lengthy
 7 and detailed analysis of, *inter alia*, whether the Food, Drug and Cosmetic Act (located
 8 at 21 U.S.C. §§ 301, *et seq.*) and its implementing regulations (located at 21 C.F.R. §§
 9 1.1, *et seq.*) (collectively, “FDCA”) establishes federal preemption for deceptive
 10 advertising cases against homeopathic drug manufacturers; whether the Complaint
 11 made lack of substantiation claims; whether Defendant’s advertising was required to
 12 be analyzed as a whole, or whether Defendant could parse out language and seek
 13 dismissal of some claims separately; and whether Plaintiff sufficiently alleged how
 14 Defendant was not following FTC advertising standards, among other claims and
 15 defenses. *Id.*; Dkt. Nos. 7, 10-16.

16 Shortly after Defendant’s motion was filed, on February 19, 2013, the Parties
 17 entered into a Stipulated Protective Order so that information could be shared for
 18 purposes of potential settlement discussions, which the Court granted on March 20,
 19 2013. Dkt. Nos. 8 & 9. On May 30, 2013, Defendant withdrew its motion to dismiss
 20 due to the Parties having agreed to terms of a settlement, in principle. Dkt. No. 17.

21 **B. The Parties’ Negotiations Regarding Settlement**

22 The Settlement Agreement is the product of vigorous, adversarial, and
 23 competent representation of the Parties and substantive negotiations throughout the
 24 pendency of this litigation. Dec. of Ronald A. Marron in support of Prelim. Approval
 25 (Dkt. No. 26-2, “PA Marron Decl.”) ¶ 4. The Parties began negotiations in earnest
 26 shortly before February 6, 2013, when Mason sent Heel a demand letter at Heel’s
 27 request, outlining labeling changes he believed needed to be made to the Products, and
 28 why Heel’s labeling claims were false, deceptive or unlawful and should be changed.

1 *Id.* The parties subsequently agreed to attend private mediation, and the settlement
 2 terms were reached with the assistance of an independent, impartial mediator, the
 3 Honorable Leo S. Papas (Ret.) of Judicate West. *Id.* at ¶ 5. The Parties attended an
 4 all-day formal mediation session before Judge Papas on April 23, 2013, and had
 5 follow-up individual mediation sessions with Judge Papas, to hammer out the details
 6 of the relief ultimately achieved. *Id.*

7 When settlement talks snagged on certain key provisions, the Parties continued
 8 to litigate and brief their claims and defenses in this action, primarily through
 9 Defendant's motion to dismiss. *See* Dkt. Nos. 6, 7, 11, 13, 14, 15, 16. For over five
 10 months, the Parties worked diligently to negotiate the final terms of a binding
 11 settlement agreement, both amongst counsel for the Parties and returning to Judge
 12 Papas for guidance in negotiating issues on which the Parties could not agree. PA
 13 Marron Decl. ¶¶ 4-6.

14 **C. Plaintiff Engaged Defendant in Substantial Discovery**

15 For the purposes of settlement, Defendant produced and Plaintiff reviewed
 16 substantial documentary evidence, and Class Counsel exercised due diligence to
 17 confirm the adequacy, reasonableness, and fairness of the settlement, both before and
 18 after mediation. *Id.* ¶¶ 7-8.² Class Counsel also conducted a detailed and
 19 comprehensive review of Food and Drug Agency ("FDA") guidance documents
 20 regarding homeopathic and over-the-counter ("OTC") drugs; the FDCA and how it
 21

22 ² Among other investigative research, Class Counsel reviewed Defendant's sales data
 23 from Spins (an independent, third party data-gathering firm) for years 2010-2012; data
 24 from Defendant's internal accounting system tallying sales in pharmacies, internet,
 25 supermarkets and sporting goods stores from 2009-2012; mechanicals of the Products'
 26 labeling at issue, including various proposals for modified labeling; Defendant's
 27 advertising; a list of Defendant's distributors; orders for the Products made by each of
 28 Defendant's relevant distributors for years 2009-2012; the Products' suggested retail
 sales prices, wholesale sales price, and unit sales throughout the United States; over a
 dozen clinical studies that Defendant claimed supported its clinical proof claims; lists
 of allopathic and homeopathic practitioners that purportedly recommend the Products
 to their patients; and Heel's profit and loss statements for its United States' based
 sales during the proposed Class Period. *Id.*

pertains to OTC homeopathic drugs; Federal Trade Commission (“FTC”) advertising standards and their applicability to the Products’ labeling claims at issue here, such as the “clinical proof” and “doctor recommended” claims. *See* Dkt. Nos. 10, 10.1, 10.2, 10.3. Class Counsel also conducted a detailed analysis of the Homeopathic Pharmacopeia of the United States (“HPUS”), and guidance documents put forth by the HPUS Committee, in its role approving homeopathic drug ingredients and setting forth minimal labeling standards for homeopathic drugs. *See, e.g., id.*; Dkt. No. 16.

D. Motion for Preliminary Approval is Granted

On October 31, 2013, the Court granted the Parties’ joint motion for preliminary approval of the Settlement, directed that the Class be notified, and set dates relevant to the Final Approval Hearing. *See* PAO. The Court found that the Settlement Agreement’s terms appeared sufficiently fair, reasonable and adequate to warrant dissemination of notice of the proposed settlement to the Class. *Id.* at 4:1-7, ¶ 5. The Court also approved the Parties’ proposed Notice Plan and Settlement Administrator. *Id.* at ¶ 10.

E. The Court Certified the Class for Settlement Purposes

In the PAO, the Court found that the requirements of Rule 23 were met for the proposed Class, and certified the Class for settlement purposes. *Id.* at ¶ 1-2. The Court appointed Plaintiff as Class Representative and the Law Offices of Ronald A. Marron as Class Counsel. *Id.* at ¶¶ 3-4.

The Court should reaffirm its Rule 23(a) and (b) findings, as the facts continue to support that: The class is numerous; common questions of law or fact exist regarding whether Defendant’s labeling was false and deceptive; Mason’s claims are typical of the Class’ claims; Mason is an adequate Class Representative as he has no interests that conflict with those of the Class; and Class Counsel is qualified to adequately represent the class. *See id.* ¶¶ 1-4; Fed. R. Civ. P. 23(a)(1)-(4). Further, the five modes of injunctive relief apply evenly across the Class, benefit all Class Members equally, and the monetary relief springs out of the same harm that justifies

injunctive relief, such that certification under Rule 23(b)(2) is appropriate. *See* PAO ¶ 2. Also, common questions predominate over individual questions and class treatment is a superior mode of judicial relief than individual litigation of each Class Member's purchases, which average \$25 per Product. *See id.*; Fed. R. Civ. P. 23(b)(3); Mot. in Supp. of Prelim Approval (Dkt. No. 26-1 at 16:24).

III. TERMS OF THE SETTLEMENT

A. Five Modes of Injunctive Relief

Defendant has agreed to provide injunctive relief by modifying its Products' labels and Defendant's websites in five significant aspects.

First, Defendant will place a new "FDA Disclaimer" on each Product's external packaging stating the following: "These statements have not been reviewed by the Food and Drug Administration. They are supported by traditional homeopathic principles." Settlement Agreement § 4.1.1 (attached as Ex. 1 to PA Marron Decl.). In addition, the FDA Disclaimer will be included in all Heel advertising to consumers that depicts a readable version of the Product's label, and all other Heel advertising to consumers that makes an Indication for Use-related claim.³ *Id.* & Ex. E (exemplars of proposed new packaging for the Products).

Second, Defendant will implement a "Dilution Disclaimer" as a result of Plaintiff's claims about deceptive labeling regarding the level of dilution of the active ingredients in the Products. The back panel of each Products' outer label or package shall be modified to include the following language, in close proximity to the Drug Facts: "'X' is a homeopathic dilution. For more information, see [URL]" which will refer customers to a designated Heel webpage for details (the "Dilution Webpage"). *Id.* § 4.1.2. In connection with the Dilution Disclaimer, Defendant has agreed to modify all websites it owns or operates to include a Dilution Webpage, containing the

³ Indications of Use are the statements that Plaintiff identified as false and misleading on the Products' packaging (e.g., "Natural Pain Relief" on Traumeel). Compl., Ex. 1 at p. 4.

1 more detailed information contemplated by the Dilution Disclaimer. *Id.* § 4.1.9. The
2 new Dilution Webpage shall explain X dilution in a manner that substantially
3 conforms to the explanation provided by the HPUS, in a language understandable to
4 the average consumer with no knowledge of homeopathy, such as a question and
5 answer format, explaining the level of homeopathic dilution or method. *Id.* & Ex. F
6 (screenshots of proposed new Homeopathic Dilution Page). Defendant shall make the
7 Homeopathic Dilution Page readily accessible from its home pages, each Product's
8 individual webpage, if any, and directly from search engines, so that consumers do not
9 have to search for additional information. *Id.* Defendant shall also place a link to the
10 FDA Compliance Policy Guide § 400.400 ("CPG") on their websites. *Id.*

11 Third, Defendant has agreed not to label the Products with the words "natural,"
12 unless the Heel Products contain all natural ingredients. *Id.* § 4.1.3. Heel shall use the
13 term "natural" in a manner that is appropriately qualified (e.g., by using an asterisk
14 that links to the phrase: "Contains [X] natural active ingredients out of [X] actives, see
15 Drug Facts"). *Id.*

16 Fourth, Defendant has agreed to cease using the words "Clinically Proven,"
17 "Proven...Effective" or any similar representations that expressly or impliedly assert
18 medical, scientific or clinical proof on any Products for which it does not have at least
19 two clinical studies performed by independent researchers that utilize generally
20 accepted protocols such as randomized, double-blind placebo-controlled trials, with
21 publication and peer review ("RCTs"). *Id.* § 4.1.4.

22 Fifth, Heel shall cease using the words "Doctor Recommended" and "[Used] by
23 doctors worldwide" unless it also discloses to consumers the percentage of those
24 doctors who are homeopathic practitioners and the percentage who are allopathic or
25 any other type of medical practitioners. *Id.* § 4.1.5.

26 Plaintiff has assisted Defendant's efforts in relabeling their Products, to ensure
27 that the modified labels comply with the UCL, FAL, CLRA, and FDCA. The Dilution
28 Disclaimer was conceived by Plaintiff's Counsel, with the average consumer in mind.

Plaintiff's counsel also developed the FDA Disclaimer, which tracks language required for FDA-approved OTC *non*-homeopathic products. 21 C.F.R. § 101.93(c)(1) ("This statement has not been evaluated by the Food and Drug Administration."). Similar FDA and Dilution Disclaimers were approved in *Gallucci* on October 31, 2012, demonstrating their suitability for this Settlement. *See Gallucci v. Boiron, Inc.*, 2012 U.S. Dist. LEXIS 157039, at *16-17 CS. D. Cal. Oct. 31, 2012 (finding that the disclaimers "afford[] meaningful injunctive relief"); PA Marron Decl. ¶ 15.

B. Monetary Relief

On top of the injunctive relief set forth above, Defendant will also contribute \$1,000,000 to a non-recapture Settlement Fund. Settlement Agreement § 4.2.1. Defendant will have no ability to recover any of the contributed funds. *Id.* Through the Fund, Defendant will provide a refund to all members of the Class who provide proof of purchase of any of the Products, or affirm that they purchased any of the Products, and return a Claim Form within the Claim-In Period. *Id.* § 4.3.1. Specifically, the refund shall be: (i) for any Claimant who provides proof of purchase (such as a receipt of product packaging), the actual purchase price as sworn to by the Class Member, up to \$25 per Product, subject to a cap of \$150 per Claimant for all claims (*Id.* § 4.3.2.1); or (ii) for any Claimant who does not provide proof of purchase, the purchase price as sworn to on the claim form, up to \$25 per Product, subject to a cap of \$100 per Claimant for all claims. *Id.* § 4.3.2.2. Payments to Class Members may be subject to *pro rata* reduction if the aggregate number of claims exceeds the Net Settlement Fund. *Id.* § 4.3.4.

In addition, if any funds remain in the Net Settlement Fund after all eligible claims, attorneys' fees, expenses, and the incentive award have been paid, the Settlement Agreement provides for distribution of any remaining funds as follows: (i) 50% as a supplemental distribution to Class claimants; and (ii) 50% to a Court-approved non-profit organization dedicated to informing consumers or advocating on

1 consumers' behalf about false and deceptive drug labeling concerns, such as
 2 Consumers Union, or in the alternative, to a non-profit organization that provides legal
 3 services on behalf of the indigent as set forth in California Code of Civil Procedure §
 4 384. *Id.* §§ 1.20, 4.3.5.

5 **C. Costs of Notice and Administration, Attorneys' Fees, and Incentive Awards**

6 All Notice costs shall be distributed from the Settlement Fund. *Id.* § 5.1. [See
 7 also Ex. G to Settlement Agreement.] The Notice Plan provided a broad range of
 8 notice through newspaper, magazine, and online media, as discussed *infra*.

9 Class Counsel has applied to the Court for an order awarding reasonable
 10 attorneys' fees and costs and an incentive award for the named Plaintiff as class
 11 representative. *Id.* § 9.1; Dkt. No. 30. Defendant has the option of responding to or
 12 contesting such application to the extent it exceeds thirty percent of the value of the
 13 Settlement for attorney's fees or \$3,500 for class representative incentive award.
 14 Settlement Agreement § 9.1. Upon Court approval, the attorneys' fees, expenses, and
 15 incentive award will be paid from the Settlement Fund. *Id.* §§ 9.2, 9.4. Defendant
 16 shall bear its own attorney's fees, costs and expenses. *Id.* § 9.3.

17 **D. Funding Successful Objections**

18 The Settlement Agreement requires Defendant to pay any additional attorney's
 19 fees incurred as a result of a successful objection, if the Parties revise the Settlement
 20 Agreement in a manner consistent with a successful objection, other than with respect
 21 to Class Counsel's attorney's fees. *Id.* ¶ 9.3.⁴ Although it is unlikely this section will
 22 be invoked because of the strength of the settlement and the Class's overwhelmingly
 23 positive reaction, this provision—which is not routine—represents a real benefit for
 24 the Class because any fees associated with a successful objection will not be assessed
 25 against the Class's Settlement Fund.

26
 27 ⁴ In the event the Court awards fees based on a successful, validly submitted objection
 28 related to the adequacy of representation by Class Counsel, the additional fees are to
 be paid from the Fee and/or Incentive award, a further benefit to the Class because the
 Settlement Fund will not be further diminished. *See id.* § 9.2.

IV. STANDARD OF REVIEW

There is a strong judicial policy in favor of the pretrial settlement of class actions. *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982). Public policy also strongly “favors settlements, particularly where complex class action litigation is concerned.” *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008); accord *Churchill Vill., LLC v. Gen. Elec.*, 361 F.3d 566, 576 (9th Cir. 2004). Preliminary approval of a class action settlement “is committed to the sound discretion of the trial judge.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998).

The Court must evaluate the fairness of the settlement in its entirety. *Id.* (“It is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness . . . [t]he settlement must stand or fall in its entirety.”). But courts must give “proper deference to the private consensual decision of the parties” because “the court’s intrusion upon what is otherwise a private consensual agreement negotiated between the parties . . . must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties,” and whether the settlement is fair, reasonable and adequate. *Id.* at 1027; see also *Knight v. Red Door Salons, Inc.*, 2009 WL 248367, at *4 (N.D. Cal. Feb. 2, 2009) (“[t]he recommendations of Plaintiff’s counsel should be given a presumption of reasonableness.”) (citation and quotations omitted).

A district court’s review of a proposed settlement is “limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.” *Officers for Justice*, 688 F.2d at 625. A “presumption of fairness arises where: (1) counsel is experienced in similar litigation; (2) settlement was reached through arm’s length negotiations; [and] (3) investigation and discovery are sufficient to allow

counsel and the court to act intelligently.” *In re Heritage Bond Litig.*, 2005 WL 1594403, at *2 (C.D. Cal. June 10, 2005); *see also Nat’l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004) (settlements that follow sufficient discovery and genuine arms-length negotiation are presumed fair). Further, the Court may approve a class action settlement upon “finding that it is fair, reasonable, and adequate.” Fed. R. Civ. P. 23(e)(2); *see also Officers for Justice*, 688 F.2d at 625. In assessing the fairness, adequacy, and reasonableness of a settlement, courts balance:

(1) the strength of the plaintiffs’ case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members to the proposed settlement.

Churchill Vill., LLC, 361 F.3d at 575 (citing *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998)).

V. THE COURT SHOULD GRANT FINAL APPROVAL TO THE PROPOSED SETTLEMENT

A. The Settlement was Reached Through Arm’s Length Negotiations, by Experienced Class Action Lawyers, and was Based on Adequate Investigation and Discovery

“A presumption of correctness is said to attach to a class settlement reached in arm’s-length negotiations between experienced capable counsel after meaningful discovery.” *In re Heritage Bond Litig.*, 2005 WL 1594403, at *9. Moreover, if the terms of the settlement are fair, courts generally assume the negotiations were proper. *See In re GM Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 785-86 (3d Cir. 1995).

Here, the settlement negotiations took place between counsel for the Parties and involved the services of a competent, experienced, and independent mediator, the Honorable Leo S. Papas (Ret.). PA Marron Decl. ¶ 5. Plaintiff had an independent

law firm—The Law Offices of Ronald A. Marron—representing his interests and the interests of the putative Class; Defendant is represented by K&L Gates LLP. The fact that the Settlement was prompted by an experienced mediator demonstrates the Settlement was not collusive. *See, e.g., Adams v. Inter-Con Sec. Sys., Inc.*, No. C-06-5428 MHP, 2007 WL 3225466, at *3 (N.D. Cal. Oct. 30, 2007) (“The assistance of an experienced mediator in the settlement process confirms that the settlement is non-collusive.”). The initial mediation session with Judge Papas was followed by approximately three months of detailed, informed, and adversarial negotiations between the Parties, both with and without Judge Papas’ assistance, and overall negotiations lasted over five months before the Settlement Agreement was finalized. PA Marron Decl. ¶¶ 4-8. Additionally, the Settlement Agreement’s prohibition on Defendant recovering any amounts that remain in the Settlement Fund provides substantial assurance that the Settlement Agreement reflects good faith on the part of the Parties. *See Stuart v. Radioshack Corp.*, No. C-07-4499-EMC, 2010 WL 3155645, at *4 (N.D. Cal. Aug. 9, 2010) (that there is “no reversion” of settlement monies to defendant “provides substantial assurance that the settlement reflect[s] good faith on the part of the negotiating parties”).

Class Counsel is experienced in class actions generally, with lead counsel having over eighteen years of experience, by lawyers with particular experience in the FDCA and regulations affecting homeopathic drug labeling. PA Marron Decl. ¶¶ 12-27; Decl. of Ronald A. Marron in support of Fee Motion (Dkt. No. 30-2, “Marron Fee Decl.”) ¶¶ 5-13. In addition, Class Counsel reviewed extensive documentation from Defendant, and independent third party data, about the Products’ sales and advertising, and fully briefed a motion to dismiss that informed the parties about the strength and weaknesses of each other cases. PA Marron Decl. ¶¶ 7-8; Dkt. Nos. 6-7, 10, 13-15.

B. The Strength of Plaintiff’s Case

“It can be difficult to ascertain with precision the likelihood of success at trial. The Court cannot and need not determine the merits of the contested facts and legal

1 issues at this stage, and to the extent courts assess this factor, it is to determine
2 whether the decision to settle is a good value for a relatively weak case or a sell-out of
3 an extraordinary strong case.” *Misra v. Decision One Mortg. Co.*, No. SA CV 07-
4 0994 DOC (RCx), 2009 WL 4581276, at *7 (C.D. Cal. Apr. 13, 2009) (internal
5 citation and quotations omitted). Plaintiff believes he had a strong case that
6 Defendant’s advertising was false or deceptive to consumers, based on arguments that
7 the average consumer is unaware of the high level of dilution in the Products and
8 could not determine that dilution level merely from seeing an “X” on the Products’
9 labels. Plaintiff also alleges the average consumer is unaware that homeopathic drugs
10 are regulated differently than other over-the-counter medicines, including the lack of
11 awareness that the FDA does not even review, much less approve, the statements on
12 Defendant’s packaging. Thus Plaintiff believes he stood a realistic chance of
13 obtaining class certification, defeating all dispositive motions filed by Defendant, and
14 proceeding to a trial on the merits where he could establish each element of the
15 reasonable consumer test under the UCL, FAL and CLRA. But getting to that point in
16 the litigation is no sure thing.

17 Plaintiff recognizes that Defendant has several factual and legal defenses that, if
18 successful, would defeat or substantially impair the value of Plaintiff’s claims. For
19 example, Plaintiff might not be able to: (1) satisfy his burden of demonstrating that the
20 Products are ineffective or that consumers are deceived; (2) overcome Defendant’s
21 claim that certain claims may be expressly or implied preempted, or bared by the
22 primary jurisdiction or safe harbor doctrines; or (3) retain class certification through
23 trial. Further, Defendant would likely assert they have clinical support for their
24 Products’ efficacy claims, and present evidence that would be subject to expert
25 analysis, dueling reports and testimony. And, even if Plaintiff established Defendant’s
26 liability, he would still be required to establish damages or entitlement to injunctive
27 relief, an area that would also be subject to expert analysis, and competent offers of
28 proof sufficient to meet Plaintiff’s burden. *See Colgan v. Leatherman Tool Grp., Inc.*,

1 135 Cal. App. 4th 663, 700 (2006) (holding that Plaintiffs have the burden of proving
 2 the proper amount of restitution, through “substantial evidence”). “The Settlement
 3 eliminates these and other risks of continued litigation, including the very real risk of
 4 no recovery after several years of litigation.” *In re Nvidia Derivs. Litig.*, No. C-06-
 5 06110-SBA (JCS), 2008 WL 5382544, at *3 (N.D. Cal. Dec. 22, 2008).

6 **C. Complexity, Expense, and Probable Length of Litigation**

7 Plaintiff’s claims involve complex and difficult regulatory issues under the
 8 FDCA, OTC drug marketing standards, and the deceptiveness of the Products’
 9 labeling. The costs and risks associated with continuing to litigate this action would
 10 require extensive resources and Court time, such as expert testimony and *Daubert*
 11 motions. “Avoiding such a trial and the subsequent appeals in this complex case
 12 strongly militates in favor of settlement rather than further protracted and uncertain
 13 litigation” *Nat’l Rural Telecomms. Coop.*, 221 F.R.D. at 527. Thus, “unless the
 14 settlement is clearly inadequate, its acceptance and approval are preferable to lengthy
 15 and expensive litigation with uncertain results.” *Id.* at 526.

16 **D. The Risk of Maintaining Class Action Status Throughout Trial**

17 While Plaintiff strongly believes that class treatment is appropriate for all
 18 reasons set forth in the Preliminary Approval Motion, there is a genuine risk that
 19 Plaintiff will not be able to maintain class action status through trial. Other than
 20 consenting to class certification for the purposes of settlement only, Defendant would
 21 vigorously oppose class certification. *See* Settlement Agreement §12.4. And, even if
 22 the class were certified, Defendant might seek decertification or modification of the
 23 class. *See, e.g., In re Omnivision Techs., Inc.*, 559 F. Supp. 2d, 1036, 1041 (N.D. Cal.
 24 2007); *Rodriguez v. West Publ’g Corp.*, 563 F.3d 948, 966 (9th Cir. 2009). *Mazza v.*
 25 *Am. Honda Motor Co., Inc.*, 666 F.3d 581 (9th Cir. 2012) has served as the impetus
 26 for a number of decertification motions. *See, e.g., Bruno v. Eckhart Corp.*, No. SACV
 27 11-0173 DOC, 2012 WL 752090 (C.D. Cal. Mar. 6, 2012). In contrast, by settling the
 28 action, Defendant effectively accedes to certification and “there is much less risk of

1 anyone who may have actually been injured going away empty-handed.” *In re*
 2 *Omnivision Techs.*, 559 F. Supp. 2d at 1041-42. Accordingly, this factor weighs in
 3 favor of final approval.

4 **E. The Settlement Amount Favors Final Approval**

5 The Settlement provides strong monetary relief for the Class and achieves
 6 everything the Plaintiff sought in his Complaint. The Settlement is also fair,
 7 reasonable and adequate, allowing the Class to be compensated up to \$150 per
 8 Claimants who have proof of purchase(s) and up to \$100 per Claimants who do not
 9 have proof of purchase(s). Settlement Agreement § 4.3.2; Decl. of Ronald A. Marron
 10 filed concurrently herewith (“FA Marron Decl.”) ¶ 3. In addition, these payments will
 11 be achieved without the delay associated with further litigation.

12 The Settlement also provides that unclaimed funds will not revert to Defendant.
 13 Settlement Agreement § 4.2.1; *see Stuart*, 2010 WL 3155645, at *4 (“no reversion” of
 14 settlement monies to defendant “provides substantial assurance that the settlement
 15 reflect[s] good faith on the part of the negotiating parties”).⁵

16 Further, the injunctive relief provided for in the Settlement cannot be
 17 overlooked. It will address the harm allegedly caused to consumers and provides
 18 Plaintiff with the relief he most desires – a change in product labeling. The value of
 19

20 ⁵ *See also In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000); *Jaffe*
 21 *v. Morgan Stanley & Co.*, No. C 06-3903 TEH, 2008 WL 346417, at *9 (N.D. Cal.
 22 Feb. 7, 2008) (“The settlement amount could undoubtedly be greater, but it is not
 23 obviously deficient, and a sizeable discount is to be expected in exchange for avoiding
 24 the uncertainties, risks, and costs that come with litigating a case to trial.”). “Courts
 25 must tread cautiously when comparing the amount of a settlement to speculative
 26 figures regarding what damages might have been won had [plaintiffs] prevailed at
 27 trial. (Citations and internal quotation marks omitted.) Indeed, ‘the very essence of a
 28 settlement is compromise, a yielding of absolutes and an abandoning of highest
 hopes.’” *White v. Experian Info. Solutions, Inc.*, 803 F. Supp. 2d 1086, 1098 (C.D.
 Cal. 2011) (quoting *Officers for Justice*, 688 F.2d at 624), *rev'd and remanded on*
other grounds sub nom., Radcliffe v. Experian Info. Solutions Inc., 715 F.3d 1157 (9th
 Cir. 2013) and 715 F.3d 1157 (9th Cir. 2013).

1 this substantive and widespread change to Defendant’s practices cannot be overstated.
 2 *See Riker v. Gibbons*, No. 3:08-cv-00115-LRH-VPC, 2010 WL 4366012, at *4 (D.
 3 Nev. Oct. 27, 2010) (approving a settlement for injunctive and declaratory relief,
 4 finding that it “achieve[d] the goals of the lawsuit”); *In re Toys “R” Us Antitrust*
 5 *Litig.*, 191 F.R.D. 347, 353-54 (E.D. N.Y. 2000) (noting “expeditious” and “deterrent”
 6 effect of class action settlements, compared to the difficulties and costs of continued
 7 litigation).

8 **F. The Stage of the Proceedings and Discovery Favor Final Approval**

9 The greater the amount of information shared between the parties, the more
 10 likely it is the parties have “a clear view of the strengths and weaknesses of their
 11 cases.” *Young v. Polo Retail, LLC*, 2007 U.S. Dist. LEXIS 27269, at *12 (N.D. Cal.
 12 Mar. 28, 2007) (quoting *In re Warner Commc’ns Sec. Litig.*, 618 F. Supp. 735, 745
 13 (S.D. N.Y. 1985)). “[I]n the context of class action settlements, ‘formal discovery is
 14 not a necessary ticket to the bargaining table’ where the parties have sufficient
 15 information to make an informed decision about settlement.” *Linney v. Cellular*
 16 *Alaska P’ship*, 151 F.3d 1234, 1239 (9th Cir. 1998) (citation and internal quotations
 17 omitted). This is especially true “where there has been sufficient information sharing
 18 and cooperation in providing access to necessary data[.]” *Misra*, 2009 WL 4581276,
 19 at *8; *see also Taifa v. Bayh*, 846 F. Supp. 723, 728 (N.D. Ind. 1994) (same).

20 Here, Plaintiff engaged in substantial informal discovery, reviewing
 21 Defendant’s financial and marketing information; confirmatory third party sales data,
 22 such as SPINS; lists of doctors who allegedly recommended certain of the Products;
 23 and scientific articles purportedly supporting the Products’ efficacy. PA Marron Decl.
 24 ¶¶ 7-8. Class Counsel also reviewed FDA guidance documents, the FDCA, FTC
 25 standards, and background evidence relating to the Products’ claims – both to prepare
 26 the Complaint and to oppose Defendant’s motion to dismiss – and were accordingly
 27 armed with the knowledge of the strengths and weaknesses of their claims and
 28 defenses. *See* Dkt. Nos. 6, 7, 10-16. Thus, the Parties had sufficient information to

1 make an informed decision about the terms of the Settlement Agreement and this
2 factor weighs in favor of final approval. *See id.*; PA Marron Decl. ¶¶ 7-8.

3 **G. The Views of Experienced Counsel Favors Final Approval**

4 In contemplating the approval of a proposed settlement, “[t]he
5 recommendations of Plaintiff’s counsel should be given a presumption of
6 reasonableness.” *Knight*, 2009 WL 248367, at *4 (citing *Boyd v. Bechtel Corp.*, 485
7 F. Supp. 610, 622 (N.D. Cal. 1979)); *see also Nat’l Rural Telecomms. Coop.*, 221
8 F.R.D. at 528 (citing *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977)). Indeed,
9 “Parties represented by competent counsel are better positioned than courts to produce
10 a settlement that fairly reflects each party’s expected outcome in litigation.” *In re*
11 *Pacific Enters. Secs. Litig.*, 47 F.3d at 378. Thus, “the Court should not without good
12 cause substitute its judgment for [counsel’s].” *Boyd*, 485 F. Supp. at 622.

13 Here, “[i]n addition to being familiar with the present dispute, Plaintiff[s’]
14 counsel has considerable expertise in . . . consumer and class action litigation.”
15 *Knight*, 2009 WL 248367, at *4; PA Marron Decl. ¶¶ 12-29; Marron Fee Decl. ¶¶ 5-
16 13. There is also nothing to counter the presumption that counsel’s recommendation
17 is reasonable. *See* FA Marron Decl. ¶ 3.

18 **H. The Reaction of Class Members to the Proposed Settlement**

19 Here, no Class members have opted out or objected to the Settlement. Decl. of
20 Gajan Retnasaba filed concurrently herewith (“Retnasaba Decl.”) ¶¶ 16, 18-19.
21 Further, no Attorneys General have filed objections or commented negatively on the
22 Settlement in response to CAFA notice. *Id.* ¶ 2; FA Marron Decl. ¶ 4; Decl. of
23 Matthew G. Ball in Support of Order for Final Approval of Settlement ¶¶ 3-4. The
24 absence of any objections to the proposed Settlement raises a strong presumption that
25 the terms of the settlement are favorable to the Class. *See, e.g., Rodriguez v. W.*
26 *Publ’g Corp.*, 563 F.3d 984, 967 (9th Cir. 2009) (objection rate of 0.014 supported
27 approval of the settlement); *Churchill Vill., LLC*, 361 F.3d at 577 (affirming approval
28 of a class action settlement where 90,000 class members received notice, and 45

objections were received). Accordingly, the reaction of the Class and other interested parties weighs in favor of preliminary approval.

I. The Adequacy of the Notice Plan Supports Final Approval

The Notice Plan was adequate, supporting final approval. Notice must be “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). “When approving a settlement, a court must ensure that notice is made in a ‘reasonable manner to all class members who would be bound by the proposal.’” *In re Ferrero Litig.*, No. 11-CV-00205-H-KSC, 2012 WL 2802051 at *2 (S.D. Cal. July 9, 2012) (citing Fed. R. Civ. P. 23(e)(1)). *See also* PAO at ¶ 10 (approving Notice Plan). Here, the Notice Plan was based on the Class Administrator’s research, to determine the most effective way to reach U.S. adults who trust homeopathic remedies, and who would be potential Class members. *See* Settlement Agreement, Ex. G; Retnasaba Decl. ¶¶ 3-8, 11. As discussed in more detail below, the Claims Administrator followed the Court’s Order on Notice. *See* PAO ¶¶ 10-13; Retnasaba Decl. ¶¶ 1-19.

1. Content of the Notices

“Settlement notices are supposed to present information about a proposed settlement neutrally, simply, and understandably” *Rodriguez*, 563 F.3d at 962 (rejecting argument that notice should have included “the expected value of fully litigating the case”). Here, the Notice presented the relevant information in an eye-catching but neutral manner, using understandable terms. *See* Retnasaba Decl., Exs. A-C. The Notice also included all information necessary to comply with due process, stating, *inter alia*, the subject matter of this litigation; that a settlement had been reached and the amount of the monetary fund; the amount each Class member could receive; how to file a claim; that each Class member had the right to exclude themselves from the Settlement Class or object, and how to exclude themselves or object; Class Counsel’s intent to apply for attorneys’ fees, expenses and compensation

for the named Plaintiff, and how and when to view those documents; the date of the Fairness Hearing and location of the Court and Court Clerk; contact information for the Claims Administrator; and instructions to view the Settlement Website for more details and to obtain a claim form. *See id.* This met the requirements of Rule 23 and due process. *See, e.g., Churchill Vill., LLC*, 361 F.3d at 575 (“Notice is satisfactory if it ‘generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard.’”) (quoting *Mendoza v. Tucson Sch. Dist. No. 1*, 623 F.2d 1338, 1352 (9th Cir. 1980)); *In re Synthroid Mktg. Litig.*, 110 F. Supp. 2d 676, 680 (N.D. Ill. 2000) (“direct mailings, toll-free 1-800 numbers, websites, and [a] call center are reasonable steps” to notify a class); *In re Ferrero Litig.*, 2012 WL 2802051, at *3 (finding notice adequate when it contained basic terms of settlement agreement and means to read full agreement, date of fairness hearing, class counsel’s intent to move for fees and incentive awards, and each class members’ right to object or opt out). The Claims Administrator also distributed the Notice Consistent with the Court’s Order. *See Retnasaba Decl.* ¶¶ 4 & Exs. A-C; PAO ¶ 10.

2. Direct Notice to Class Members

The Products were not sold direct-to-consumers and Defendant did not have direct contact information for any Class members. Decl. of Christian Grimm (filed under seal at Dkt. No. 23) ¶ 3. Therefore, notice by publication was the best notice practicable under the circumstances and reasonable. *See id.*; Fed. R. Civ. P. 23(e)(1).

3. Magazines

The Claims Administrator published Notice of the Settlement in the January issue of *Prevention* magazine, a health-related journal that has a circulation of 2,800,000 individuals and audience of 8,600,000. Retnasaba Decl. ¶ 5 & Ex. B.

4. Newspapers

The Claims Administrator published Notice of the Settlement in the nationwide edition of the New York Times, which has a circulation of 1,500,000 individuals and

1 an audience of 3,700,000; and in the San Diego Union Tribune once a week for four
2 weeks, sufficient to meet CLRA notice requirements. *Id.* ¶¶ 3, 5 & Exs. A & B.

3 **5. Press Releases**

4 On January 30, 2014, the Claims Administrator issued a party-neutral press
5 release over PR Newswire's US1 National Newswire, which provided the release to
6 thousands of media outlets across the country, including national and local
7 newspapers, websites, television and radio stations. Retnasaba Decl. ¶ 6 & Ex. C.
8 The press release was picked up and republished by over 300 media outlets. *Id.*

9 **6. Online Notice**

10 On or before November 14, 2013, the Claims Administrator commenced a
11 targeted online notice plan that included Google Display Network and Microsoft
12 (Bing/Yahoo) Display Network banner advertising; a dedicated Facebook page to
13 provide information to potential class members and others seeking information about
14 the proposed settlement; and ads on consumer class action websites. *See id.* ¶¶ 7-8.
15 This online advertising campaign generated more than 120,000,000 impressions as of
16 February 10, 2014. *Id.* ¶ 9. Out of those impressions, 10,000,000 were unique, which
17 establishes the deep level of "reach" achieved for the online part of the notice plan.
18 *Id.* ¶ 10.

19 On or before November 13, 2013, the Claims Administrator also established an
20 interactive, dedicated Settlement Website to provide information to potential class
21 members and others seeking information about the proposed settlement, and to
22 facilitate the filing of online claims, appearing at
23 www.HeelClassActionSettlement.com. *Id.* ¶ 11. The Settlement Website provided:
24 (a) a list of Defendant's products addressed in the litigation; (b) an online claims filing
25 feature which allows class members to file a claim online and upload supporting
26 documentation where applicable; (c) answers to frequently-asked questions; (d)
27 important dates; (e) contact information for the Claims Administrator, including a
28 case-dedicated mailing address, toll-free telephone number, and email address; and (f)

1 full and complete copies of the following documents: (1) Notice of Proposed Class
 2 Action Settlement (in English and Spanish); (2) Claim Form (in English and Spanish);
 3 (3) Settlement Agreement; (4) Preliminary Approval Order; (5) Complaint; (6) the
 4 Court's Amended Order Preliminarily Approving Class Action Settlement, Certifying
 5 the Class, Providing for Notice and Scheduling Order; (7) motions to seal and orders
 6 granting motions to seal; and (8) Class Counsel's Motion for Attorney's Fees, Costs
 7 and Incentive Award for the Class Representative. *Id.* ¶¶ 12, 15. As of January 30,
 8 2014, the Settlement Website had registered 33,000 unique visitors. *Id.* ¶ 11.

9 **7. Additional Notice Efforts**

10 The Claims Administrator also established a toll-free telephone number, with
 11 live operators. *Id.* ¶ 14. The number received eleven calls from Class members and
 12 other interested persons. *See id.* No Class member has complained about the
 13 sufficiency of the notice or the claims procedures. *Id.* ¶ 16.

14 **8. Notice to Attorneys General of Each State**

15 Pursuant to the Class Action Fairness Act, 28 U.S.C. § 1715, on October 29-30,
 16 2013, Defendant's attorneys served 51 Notice of Settlement packages upon all
 17 Attorneys General in the United States, its possessions and territories and the U.S.
 18 Attorney General. Ball Decl. ¶ 3. No Attorney General objected. *Id.* ¶ 4; Retnasaba
 19 Decl. ¶ 2; FA Marron Decl. ¶ 5. The 90-day window between giving notice and when
 20 a final approval order may be entered has expired. 28 U.S.C. § 1715(d).

21 **J. The Summary of Claims Information and Reaction of the Class to the** 22 **Proposed Settlement Support Final Approval**

23 **1. Total number of opt-out requests and objections received**

24 The opt-out and objection deadline for this matter was February 5, 2014. PAO
 25 at ¶¶ 7, 18. To date, no requests to opt out from the Settlement Agreement have been
 26 received. Retnasaba Decl. ¶ 18; FA Marron Decl. ¶ 5. No objections have been
 27 received. Retnasaba Decl. ¶ 19; FA Marron Decl. ¶ 5. Given the millions of unique
 28 impressions that the print and online versions of the Notice achieved, the existence of

1 zero requests for exclusion and zero objections from the Class weigh in favor of final
2 approval. *See* Retnasaba Decl. ¶¶ 3, 5-6, 9-10, 13.

3 **2. Total number of valid claims received**

4 The claims filing deadline for this matter will not expire until ninety days after
5 final judgment is entered. PAO at ¶ 17. To date, 341 physical claim forms and 9,633
6 online claim forms, for a total of 9,974 filed claims, have been received. Retnasaba
7 Decl. ¶ 17. The Claims Administrator anticipates receiving 18,000 claims total by the
8 time the June 5, 2014 claims deadline is reached. *Id.* Subtracting for duplicates and
9 eliminating for fraud, an approximate net of 13,500 claims for monetary relief by
10 Class members is expected. *Id.*

11 **3. Total dollar amount to be paid to Class Members who submitted** 12 **valid claim forms**

13 The estimated 13,500 unique claims received in this matter, *see id.*, will be
14 subject to pro rata reduction as set forth in the Settlement Agreement, § 4.3.4. Based
15 on the amount remaining in the Settlement Fund after subtracting attorney's fees,
16 costs, incentive award, taxes and claims administration, Class members will receive an
17 estimated \$488,452.30 in the aggregate, or \$35.89 each. Retnasaba Decl. filed in
18 support of Fee Motion (Dkt. No. 30-4, "Retnasaba Fee Decl.") at ¶ 7. Even though the
19 Settlement Agreement provides that fifty percent of excess funds be allocated to a
20 non-profit *cy pres* recipient, Settlement Agreement § 4.3.5, this fall back provision is
21 not necessary. No money will remain in the Settlement Fund for distribution on a *cy*
22 *pres* basis because sufficient claims were made to provide cash refunds to all Class
23 members who made a claim. *See* Retnasaba Fee Decl. at ¶ 7. This poses an additional
24 benefit to the Class as all funds available will be distributed directly to Class
25 members, removing the need for *cy pres* relief, which is inherently a substitution for
26 direct monetary payments to the Class.

1 **4. Estimate of the amount to be paid to the Class Administrator**

2 To date, the estimated costs incurred to administer the Settlement Agreement,
3 plus the anticipated costs of distributing settlement funds to Class Members is
4 estimated at \$208,050.00. Retnasaba Fee Decl. ¶ 6; *see also* Settlement Agreement §
5 5.3.4 (agreeing that the Claims Administrator’s fees and costs shall be paid out of the
6 Settlement Fund).

7 The foregoing Summary of Claims Information weighs in favor of final
8 approval because all valid claims will be paid, no one has objected or opted out, and
9 each Class Member will receive approximately \$35.00, for a total in excess of
10 \$488,452 paid directly to the Class as cash refunds. *See* Retnasaba Fee Decl. at ¶ 7.

11 **K. The Presence of a Governmental Participant**

12 No government entity participated in the Settlement. All Attorneys General,
13 however, were notified of the terms of the Settlement and none objected. Retnasaba
14 Decl. ¶ 2; Ball Decl. ¶¶ 3-4. This provides assurance that consumer protection
15 authorities across the nation believe the Settlement is fair. Consequently, this factor
16 favors final approval.

17 **L. The Balanced Factors Weigh in Favor of Final Approval**

18 “Ultimately, the district court’s determination [regarding the fairness and
19 adequacy of a proposed settlement] is nothing more than ‘an amalgam of delicate
20 balancing, gross approximations and rough justice.’” *Officers for Justice*, 688 F.2d at
21 625 (citation omitted). “[I]t must not be overlooked that voluntary conciliation and
22 settlement are the preferred means of dispute resolution. This is especially true in
23 complex class action litigation.” *Id.* Here, all relevant factors weigh in favor of final
24 approval of the Settlement, especially when considered *in toto*.

25 **VI. CONCLUSION**

26 For the foregoing reasons, Plaintiff respectfully requests the Court reaffirm its
27 rulings certifying the Class for settlement purposes, and grant final approval to the
28 Settlement Agreement.

1 Dated: February 13, 2014

Respectfully Submitted,

2 /s/ Ronald A. Marron

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